

Honorable Brian D. Lynch
Chapter 11
Hearing Date: October 26, 2022
Hearing Time: 9:00 a.m.
Location: Tacoma, WA

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
WESTERN DISTRICT OF WASHINGTON**

In re:

STEPHEN ROBERT BROWN,

Debtor.

Case No. 22-40997-BDL

UNITED STATES TRUSTEE'S LIMITED
OBJECTION TO DEBTOR'S MOTION FOR
ORDER AUTHORIZING EMPLOYMENT
OF ATTORNEY

Acting United States Trustee for Region 18, Gregory M. Garvin ("U.S. Trustee"), hereby brings this Limited Objection to the Motion for Order Authorizing Employment of Attorney, and the Order Authorizing the Employment of Attorney's Mark McClure and Masafumi Iwama (the "Proposed Attorneys"). The Proposed Attorneys facilitated the transfer of \$500,000.00 to the Debtor from a trust believed to be controlled by Debtor's father shortly before the filing of the bankruptcy case, and they continued to act as an escrow agent for the transaction and as the trustee on the deed of trust granted to the father's trust after the case was filed.

I. BACKGROUND

The Debtor filed a petition for relief under Title 11, chapter 11, on August 11, 2022. The vast majority of the Debtor's debts are due to a proceeding brought in Pierce County Superior Court, case number 20-2-068867-7, entitled *Moegling v Brown* (the "Pierce County Litigation"). ECF #13, pg. 38. Debtors listed a \$2,480,000.00 claim owed to Lisa S. Moegling and a \$181,000.00 claim owed to Newman Du Wores, LLP, who represented Debtor in the case with Ms. Moegling. *Id.* pg. 23. The only other unsecured debt listed are two small credit cards.

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1 On July 22, 2022, the Jury in the Pierce County Litigation found against the Debtor on the
2 question of fraud by intentional misrepresentation and fraud by concealment and found that Ms.
3 Moegling had damages in the amount of \$2,580,000.00. See Exhibit A to the Declaration of
4 Matthew J.P. Johnson (the “Johnson Decl.”). Subsequently, on August 1, 2022, Ms. Moegling
5 filed a Motion for Judgment on the Special Jury Verdict, which was not heard due to the filing of
6 this bankruptcy case. *Id.*

7 Based on the Motion for Order Authorizing Employment of Attorney, Debtor retained the
8 Proposed Attorneys on July 28, 2022. ECF #36, pg. 2. Soon after the Proposed Attorneys were
9 retained, it appears that they prepared a deed of trust (the “Deed of Trust”) to secure repayment of
10 \$500,000.00 promissory note (the “Promissory Note¹”) by the Debtor’s real property. See Exhibits
11 B and C to the Declaration of Johnson Decl. The Promissory Note is made payable to, “Robert G.
12 Brown, Trustee of Brown Family Decedents Trust dated February 23, 2017².” See Exhibit C to the
13 Johnson Decl. This transaction appears to be the source of the \$494,641.70 held in the Proposed
14 Attorney’s client trust account. ECF #13, pg. 8.

15 The Deed of Trust is dated August 10, 2022, and was recorded with the Pierce County
16 Auditor on August 11, 2022. See Exhibit C. The Deed of Trust was notarized by Masafumi Iwama,
17 the address for the Law Office of Mark McClure is listed on the top of the document for the return

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19 ¹ The Promissory Note bears interest at “the rate of *twenty five* percent (3%) per annum.”
20 *emphasis added*. When there is a conflict a negotiable instrument, generally, “words prevail over
21 numbers.” RCW 62A.3-114. Thus, it appears the note is payable at twenty-five percent interest
per annum, which equals \$10,416.66 per month in interest, or approximately \$625,000 in interest
over the term of the loan.

22 ² It is not clear if the Brown Family Decedents Trust dated February 23, 2017, is a legal entity.
23 Instead, based on Debtor’s testimony at the 341 meeting of creditors held on October 18, 2018,
24 the money was borrowed from a Decedents Trust B, which is an off shoot of the Brown Family
Trust, dated January 14, 1994.

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1 of the Deed of Trust once recorded, and the Iwama Law Firm is listed as the Trustee of the Deed
2 of Trust. *Id.* Further, it appears the Proposed Attorney’s used their IOLTA as an escrow account
3 to facilitate this transaction. *See* Johnson Decl., Exhibit D. Furthermore, it should also be noted
4 that the amount transferred to the IOLTA by the Brown Family Trust appears to have been
5 \$700,000.00, not \$500,000.00. *See* Exhibit D. However, \$200,000.00 was kept in the IOLTA and
6 was returned to the “Brown Family Decedents Trust” on August 16, 2022, five days after the filing
7 of the petition. *Id.* ³

8 **II. ANALYSIS**

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10 The Proposed Attorney’s had a conflict of interest when the case was filed. Attorneys for
11 the Debtor in Possession must not represent an interest adverse to the estate, and [be]
12 disinterested persons.” 11 U.S.C. § 327(a). At the time of filing, the Iwama Law Firm, of which
13 one of the Proposed Attorneys was the proprietor, is listed as the Trustee of the Deed of Trust,
14 and it appears Mr. Mclure was acting as an escrow agent for Robert Brown. In Washington, the
15 trustee of the deed of trust has a “duty of good faith to the borrower, beneficiary, and grantor.”
16 RCW § 61.24.010(4). The existence of these obligations, with duties to both the Debtor and a
17 creditor of the estate, created a potential conflict of interest for the Proposed Attorneys. While it
18 appears that a successor trustee may have been appointed, and escrow is now closed, the
19
20

21 ³ Debtor may not have an obligation to repay the \$500,000.00. Pursuant to the Brown Family
22 Trust, Dated January 14, 2017, “[t]he Trustee shall reduce a beneficiary’s share by any gifts or
23 loan.” *See* Declaration of Matthew J.P. Johnson Exhibit E. Thus, the loan purportedly secured by
24 the Deed of Trust may be an advance of Debtor’s beneficial interest in the trust, which will simply
be offset once both of the trustors pass away.

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1 Proposed Attorney's employment should only be approved as of the date that the conflict was
2 resolved, not to the beginning of the case as requested.

3 There are also questions regarding whether the Proposed Attorneys owe any additional
4 duties to Robert Brown as he may reasonably believe that the Proposed Attorneys were
5 representing his interests by drafting documents to memorialize and secure repayment of the
6 transferred funds. "The essence of the attorney/client relationship is whether the attorney's advice
7 or assistance is sought and received on legal matters." *Bohn v. Cody*, 119 Wash. 2d 357, 363,
8 832 P.2d 71, 75 (1992) (citing 1 R. Mallen & J. Smith § 11.2 n.18; 7 Am. Jur. 2d *Attorneys at*
9 *Law* § 118 (1908). "The existence of the relationship 'turns largely on the client's subjective belief
10 that it exists.'" *Id.* (quoting *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983)).

12 The Bohn case, cited above, involved facts very similar to the facts of this case. In that
13 case, Lucille and Landis Bohn loaned money to their daughter after discussing aspects of the
14 proposed loan with their daughter's attorney. After their daughter failed to repay the loan, the
15 Bohns sued the attorney. The attorney in that case had several meetings with the parents regarding
16 advancing funds to pay off a real estate contract. The mother contended that the attorney owed
17 her duties under an attorney client relationship because the attorney "gave her legal advice and
18 performed legal services for her," including preparing an assignment. *Id.* at 364. While the court
19 found that no such relationship existed, the court acknowledged that "[d]etermining whether an
20 attorney/client relationship exists necessarily involves questions of fact." *Id. citing* 48 Am. Jur.
21 Proof of Facts 2d, Existence of Attorney-Client Relationship 525 (1987); 1 R. Mallen & J. Smith,
22 Legal Malpractice § 11.2 n.12 (3d ed. 1989).

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1 The record currently before this Court does not provide any information regarding what
2 conversations, if any, were had with Robert Brown regarding these transactions, whether he was
3 represented by independent counsel, or whether he understood that the Proposed Attorneys did
4 not represent his interests. All that is currently before this court is that the Proposed Attorneys
5 appear to have created a note and deed of trust that apparently were intended to protect and benefit
6 Robert Brown, who is a creditor of the estate. Given these facts, before the Proposed Attorney's
7 employment is approved, they should be required to supplement the record to clarify their
8 relationship with Robert Brown.
9

10 DATED this Wednesday, October 19, 2022;

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12 Respectfully submitted,

13 Gregory M. Garvin
14 Acting U.S. Trustee for Region 18

15 /s/ Matthew J.P. Johnson
16 Matthew J.P. Johnson, WSBA #40476
17 Attorney for the United States Trustee
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